No. 83-2030

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals, Tenth Circuit

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

Whether the state statute on its face unconstitutionally infringes upon protected free speech rights of public school teachers.

Whether the state statute is so facially overbroad as to infringe upon the protected free speech rights of public school teachers.

Whether if the state statute is facially overbroad the statute can be so narrowly construed as to uphold the statute's constitutionality.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 729 F.2d 1270 and is printed on pages 1a through 13a of the Appendix to the Jurisdictional Statement. The opinion of the United States District Court for the Western District of Oklahoma is not reported and is printed on pages 1b through 22b of the Appendix to the Jurisdictional Statement. (References in this brief to these opinions will be to page numbers in the Jurisdictional Statement rather than to pages of the Joint Appendix.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1984. The Jurisdictional Statement appealing Section II of the Tenth Circuit majority opinion was filed with this Court on June 9, 1984. Probable jurisdiction was

noted by this Court on October 1, 1984. The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(2) since the Court of Appeals held that an Oklahoma Statute was facially overbroad in violation of the First Amendment to the United States Constitution.

THE STATE STATUTE FOUND TO BE FACIALLY UNCONSTITUTIONAL

The challenged statute, 70 Okla. Stat. Sec. 6-103.15, provides:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
   a. committed with a person of the same sex, and
   b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity;
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors will be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

The statute defines "public homosexual activity" as being the commission of the act defined in Section 886 of Title 21 of the Oklahoma Statutes when that act is committed with a person of the same sex and indiscreetly and not in private. 21 Okla. Stat. Sec. 886 is Oklahoma's criminal sodomy statute. That statute provides:

> Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . .

STATEMENT OF THE CASE

This case concerns a *facial* challenge to the constitutionality of a portion of the Oklahoma Teacher Fitness Statute, 70 Okla. Stat. Sec. 6-103.15. The challenged section empowers Oklahoma school boards to suspend, dismiss, refuse to renew or refuse to employ public school teachers who solicit, impose, encourage, advocate or promote indiscreet criminal homosexual sodomy, when such speech or conduct so adversely affects the occupational performance of that individual as to impede the purposes of public education. The statute lists the considerations which are to be used by the school board in determining whether there is a "nexus" between the proscribed speech or conduct and occupational performance. The specified considerations are the likelihood the teacher's soliciation, etc., may adversely affect school children or school employees; the proximity in time or place to the teacher's duties as a public school teacher; any extenuating or aggravating circumstances involved in the solicitation; and whether the solicitation of criminal, homosexual sodomy is of such a repeated or continuing nature as to tend to encourage or dispose minor school children to commit criminal, homosexual sodomy.

Since this involves a facial challenge no facts are presented to this Court. No facts have been presented that the Oklahoma City Board of Education has used the challenged statute to refuse to hire anyone or to terminate the employment of any employee.

In the District Court, the Task Force contended that, the statute was facially defective because it infringed upon

protected speech, was vague and overbroad, interfered with its members' privacy rights, and violated the Equal Protection and Establishment clauses of the United States Constitution. The District Court, after stipulation by the parties that there were no facts at issue and after presentation of briefs and argument, rejected all of the arguments of the Task Force and entered judgment for the Board of Education.

The Tenth Circuit, in Section I of the majority opinion, affirmed the ruling of the District Court that the statute was not vague, did not interfere with any right to privacy, and did not violate either the Equal Protection or Establishment clause. Further, the appellate court found no constitutional problem in that portion of the statute which permits the discharge of a teacher for engaging in "public homosexual activity", defined in Section (A)(1) of the challenged statute.

In Section II of the Tenth Circuit majority opinion, the court ruled that that portion of the statute permitting employment action against teachers for "public homosexual conduct" infringed upon free speech and was unconstitutionally overbroad. A dissenting opinion would have affirmed the District Court on all grounds.

The section of the statute which the Tenth Circuit majority opinion held to be facially unconstitutional provides that a school board may terminate the employment of, or refuse to hire, those who have engaged in "public homosexual conduct" to such a degree the applicant or teacher would be or is unfit as a teacher. "Public homosexual conduct" is defined in the statute as the advocating, soliciting, imposing,

encouraging or promoting of public or private "homosexual activity" in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees. The statute defines "public homosexual activity" as "the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is: (a) committed with a person of the same sex, and (b) indiscreet and not practiced in private; . . ."

The commission of an act "defined in Section 886 of Title 21" of the Oklahoma Statutes is the commission of criminal sodomy, *Carson* v. *State*, 529 P.2d 499 (Okl.Cr. 1974); *Canfield* v. *State*, 506 P.2d 987 (Okl.Cr. 1973), *appeal dismissed*, 414 U.S. 991 (1973), *rehearing denied*, 414 U.S. 1138 (1973); *Moore* v. *State*, 501 P.2d 529 (Okl.Cr. 1972), *cert. denied*, 410 U.S. 987 (1972).

Thus, the portion of the statute held by the majority of the circuit to be unconstitutional refers to the advocacy, solicitation, etc., of criminal homosexual sodomy when made in such a manner as to create a substantial risk the solicitation of criminal sodomy comes to the attention of school children or school employees and renders a teacher unfit as a teacher after consideration of the challenged statute's *nexus* requirements.

The majority found that First Amendment rights were infringed because the statutory term "encouraging", "promoting" and "advocating" did not comply with the "imminent lawless action" test of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). The statute was, therefore held to be facially overbroad, and not readily susceptible to a narrowing construction.

The Board of Education has appealed Section II of the Tenth Circuit majority opinion. The Gay Task Force has not petitioned for *certiorari* concerning Section I of the Tenth Circuit majority opinion.

SUMMARY OF ARGUMENT

In the process of facially invalidating the challenged Teacher Fitness Statute, the Tenth Circuit majority committed four fundamental and substantial errors which warrant reversal by this Court.

First, it interpreted the challenged statute so as to deviate from that statute's plain meaning and virtually unavoidable implications. Focusing on the statutory language requiring that the factors articulated therein concerning the *nexus* between the proscribed teacher speech conduct and occupational performance be "considered" in making the requisite determination of unfitness, 70 Okla. Stat. Sec. 6-103.15 (C), the Tenth Circuit majority concluded that "[a]n adverse effect is apparently not even a prequisite to a finding of unfitness." 729 F.2d 1270, 1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 8a. The Board of Education respectfully submits that such an interpretation is unnecessarily obtuse, deviates from the statute's plain meaning, and fails to seek the "limiting construction" which this Court has required lower courts to do where facial invalidation of previously unconstrued state statutes is sought. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). The Board of Education further submits that quantum leaps of reasoning are not required to conclude that what a statute requires to be considered it also requires to be applied.

Such a conclusion was easily reached by the District Court below. Jurisdictional Statement, Appendix, 6b, 9b.

Second, the Tenth Circuit majority erred, even assuming *arguendo* the impropriety of its drawing the conclusion urged above, in failing to abstain, pending certification of the issue to the Supreme Court of Oklahoma, 20 Okla. Stat. Sec. 1602, or dismiss. This Court has long recognized that principles of comity, federalism, and judicial economy require federal judicial abstention especially where the challenging party seeks facial invalidation of a previously uninterpreted state statute. *See Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 500-502 (1941). While abstention may be avoided by establishing that no alternative to federal adjudication is open, a state court alternative is open where a state court interpretation of a previously unapplied statute may obviate the necessity of pursuing the federal constitutional claim.

Third, the Tenth Circuit majority erred by applying a hybrid standard of First Amendment review of the speech applications of the challenged statute which focused to an impermissible degree on whether the proscribed speech included speech which did not create a clear and present danger of imminent lawless action. *See* 729 F.2d 1270, 1274 (10th Cir. 1984); Jurisdictional Statement, Appendix, 6a-7a. In giving virtually controlling weight to the First Amendment test established by *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the Tenth Circuit failed to note that that test has been limited by this Court, *even where criminal penalties are imposed*, in *Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 435 U.S. 829, 841 (1978), and especially in cases where governmental employment in general — and public school teacher speech in particular — are involved. *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563, 568-574 (1968). In these cases, this Court articulated a balancing standard of First Amendment review, and further established specific factors to be considered in determining whether particular public school teacher speech enjoyed constitutional protection. *Id.* at 570-574. After engrafting the inapposite "material or substantial disruption of normal school activities" approach of *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), (inapposite because that case did not deal with public school teacher speech) onto the *Pickering* balancing approach, the Tenth Circuit majority proceeded to conclude, essentially, that the statutory requirements (as it interpreted them) did not satisfy the *Brandenburg* and *Tinker* tests. *See* 729 F.2d 1270, 1274-1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 6a-8a. This conclusion was reached, of course, as a matter of law, and in the context of the *facial* nature of the instant challenge. The Board of Education respectfully submits that, by pursuing this analysis, the Tenth Circuit majority failed to adequately consider the special factors which this Court concluded in *Pickering* should be considered *with particularity* in the special circumstances presented by public school teacher speech. In any case, any *Pickering* analysis based on incorrect interpretations of the challenged statute would, produce, of course, incorrect results.

Finally, the Tenth Circuit majority erred in facially invalidating the challenged statute. The Board of Educa-

tion will strongly urge, of course, that the proper application of the proper standard of review to the statute, properly construed, inevitably results in the conclusion that no facial overbreadth exists in the challenged statute *at all*. This conclusion is buttressed by the breadth necessarily inherent in the balancing factors articulated by this Court in *Pickering*. In fact, the statutory *nexus* language tracks, *virtually verbatim*, the embellishing factors articulated by the lower courts (and approved with unwavering consistency on appeal) in applying the *Pickering* approach. *See, e.g., San Diequito Union High School District* v. *Commission on Professional Competence*, 185 Cal. Rptr. 203, 205 (1982); *Coupeville School District No. 204* v. *Vivian*, 677 P.2d 192 (Wash. App. 1984).

Nevertheless, if any overbreadth remains in the statute as properly interpreted, the Board of Education respectfully submits that such overbreadth is not "substantial" as that term has been applied by this Court. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); *New York* v. *Ferber*, 458 U.S. 747, 767 (1982). Indeed, the Tenth Circuit majority, while facially striking the section of the challenged statute which proscribed "advocating, soliciting, imposing, encouraging, or promoting" criminal homosexual sodomy *did not even consider* the extent to which the proscriptions against soliciting or imposing criminal homosexual sodomy might affect the substantial overbreadth calculus, erroneously analyzing the statute as one which exclusively regulated "pure speech". 729 F.2d 1270, 1274, (10th Cir. 1984). Rather than adequately examining the scope of the potential overbreadth presented by the statutory proscriptions against "advocating, . . . encouraging, or promoting" criminal homosexual sodomy in light of the apposite *Pickering* standard of review, it dismissed the Board of Education's "substantial overbreadth" contention in conclusory terms. The Board of Education maintains that the challenged Teacher Fitness Statute is one which, if overbroad at all, has a legitimate sweep which "dwarfs its arguable impermissible applications", *New York* v. *Ferber*, 458 U.S. 747, 773 (1982), and should be facially upheld, on the merits, by this Court.

ARGUMENT

I. THE CHALLENGED OKLAHOMA TEACHER FITNESS STATUTE PROSCRIBES NO SPEECH WHICH IS CONSTITUTIONALLY PROTECTED TO PUBLIC SCHOOL TEACHERS.

A. The Interpretation Placed Upon the Challenged Statute by Tenth Circuit Is At Variance With the Plain Meaning of That Statute.

The challenged statute, 70 Okla. Stat. Sec. 6-103.15, does no more than to preclude public school teachers from advocating, soliciting, imposing, encouraging, or promoting homosexual sodomy (criminalized by 21 Okla. Stat. Sec. 886) in a manner which impedes the broad purposes of public education which the Oklahoma Legislature may validly protect. At the outset, it must be noted that as the opinion under appeal here, *National Gay Task Force* v. *Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984) [hereinafter Tenth Circuit majority], did not specifically address the statutory language "soliciting or imposing," it must be assumed that that court found teacher solicitation or imposition of criminal homosexual sodomy to be speech or conduct unprotected to public school teach-

ers by the First Amendment. 729 F.2d 1274; Jurisdictional Statement, Appendix, page 7a. Thus, only that portion of the statute proscribing "advocating, encouraging, or promoting" criminal homosexual sodomy will be directly addressed at this point.

Appellant [hereinafter Board of Education] respectfully submits that the statute proscribes such speech or conduct only when the broad purposes of public education (described in detail in Proposition I-C-3 *infra*) are impeded by the teacher's utterance or conduct. The Board of Education further submits that this conclusion is evidenced by the plain meaning of the five *nexus* requirements of the statute (so described because they require a *nexus* between the teacher's speech or conduct and occupational performance before the statute's penalties may be imposed), which were virtually ignored, or at best misconstrued, by the Tenth Circuit majority below. *See* 729 F.2d 1270, 1274-1275, Jurisdictional Statement, Appendix, pp. 6a-8a.

The first of the challenged statue's *nexus* requirements is contained in 70 Okla. Stat. Sec. 6-103.15(A)(2), and excludes from the statute's proscriptions any utterance or conduct which is not performed "in a manner that creates a substantial risk that . . . [it] will come to the attention of school children or school employees . . .". The second through fifth *nexus* requirements are contained in the next section of the challenged statute in the following language:

> The following factors will be considered in making the determination whether the teacher, student teacher, or teachers' aide has been rendered unfit for his position:
>
> 1. The likelihood that the activity or conduct may adversely affect students or school employees;

> 2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's, or teachers' aide's official duties;
> 3. Any extenuating or aggravating circumstances; and
> 4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

Id. Sec. 6-103.15(c).

The Tenth Circuit majority reasoned as follows in evaluating the extent to which these *nexus* requirements narrowed the broader proscriptions contained in Sec. 6-103.15(A):

> The statute does not specify the weight to be given to any of the factors listed. An adverse effect is apparently not even a prerequisite to a finding of unfitness. A statute is saved from a challenge to its overbreadth only if it is "readily subject" to a narrowing construction. It is not within this Court's power to construe and narrow state statutes . . . .

729 F.2d at 1275; Jurisdictional Statement, Appendix p. 8a.

Several observations may be made concerning this analysis.

First, while it is true that the statute only literally requires the last four *nexus* requirements to "be considered in making the determination [of unfitness]," the Board of Education respectfully submits that only the most obtuse reading of the statute would permit its interpretation so as to require a consideration of factors which could then be ignored in making the requisite finding of unfitness. This is especially true in light of the fact that Oklahoma requires its hearing officers to make written findings of fact

for purposes of appeal in both probationary and nonprobationary teacher dismissal proceedings. *Jackson* v. *Independent School District No. 16*, 648 P.2d 26, 32 (Okla. 1982) (probationary teachers); 70 Okla. Stat. Sec. 6-103.11 (tenured teachers). Moreover, since this case was brought by Appellee [hereinafter Gay Task Force] by way of a *facial* challenge, prior to any interpretation of the challenged statute by the Oklahoma Supreme Court (and, for that matter, prior to the invocation of the statute by any school board in any way), it may fairly be said that the interpretation urged by the Board of Education is not inconsistent with any of the statute's prior applications or interpretations. *Compare Cox* v. *New Hampshire*, 312 U.S. 569, 574-577 (1941), *with Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155-159 (1969). In any case, given the miniscule leap of reasoning required to conclude that what the statute requires to be considered it *also* requires to be employed as a partial basis for decision, it is respectfully submitted that the Tenth Circuit committed reversible error in not finding the statute "readily subject" to narrowing construction. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). Finally, while the Tenth Circuit majority's observation that the statute does not specify the weight to be given to any of the *nexus* factors (other than the first) is manifestly correct, it is also true that this Court, in establishing the "guidelines" for balancing free speech interests in teacher speech cases, did not specify the weight to be accorded the various competing interests. *See Pickering* v. *Board of Education*, 391 U.S. 563, 570-574 (1968) (to be discussed more fully in Proposition I-C-3 *infra*). In any case, how such a specification might practically be accomplished is a question the answer to which is not readily apparent. In

short, the words "advocating, soliciting, imposing, encouraging, or promoting" must not be taken out of context: the five *nexus* requirements of the statute are as much a part of the statute as the verbs cited above.

Sixty years ago, Justice Holmes wrote for a unanimous Court in *Fox* v. *State of Washington*, 236 U.S. 273 (1915), that

> [s]o far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts.

Id. at 277; *c.f. Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964). The policies of federalism, comity, and judicial economy expressed by this premise are as valid today as they were in 1915. These policies are especially apposite where — as here — any constitutionally relevant ambiguity is *de minimis* at most.

Since the other purported ambiguity relates to whether the statutory proscription against public school teachers "advocating, . . . encouraging, or promoting" criminal homosexual sodomy precludes any speech which does not create a clear and present danger of incitement to "imminent lawless action," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), and since the Board of Education will vigorously maintain in Proposition I-C, *infra*, that the Tenth Circuit majority's reliance on *Brandenburg* was misplaced, *see, e.g., Pickering* v. *Board of Education*, 391 U.S. 563, 568-574 (1968); *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564

(1972); *Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 435 U.S. 829, 841 (1978), this purported ambiguity will not be addressed at this point.

B. Alternatively, Should Any Ambiguity Relevant to First Amendment Scrutiny Remain, Then the Court Below Violated Principles of Comity and Federalism by Failing to Abstain or Dismiss.

The Board of Education will maintain, of course, that the challenged statute's proscriptions, read in light of the *nexus* requirements described above, contain no ambiguity whatsoever, or, at most, an ambiguity so miniscule as to be "readily subject" to narrowing construction by this Court. This result was accomplished, without the necessity for great feats of logical gymnastics, in the District Court below. *See*, Jurisdictional Statement, Appendix, 6b, 9b. Nevertheless, should this Court disagree, the Board of Education respectfully submits that the appropriate remedy, even at this stage of the judicial proceedings, is either dismissal or abstention, with certification of any residually relevant question of law to the Supreme Court of Oklahoma pursuant to 20 Okla. Stat. Sec. 1602, which provides, in relevant part, that

> [t]he Supreme Court . . . may answer questions of law certified to it by the Supreme Court of the United States, . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinitive of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or the Court of Criminal Appeals of this state.

This Court has long recognized that principles of comity and federalism require federal judicial abstention especially where the challenging party seeks facial invalidation of an unconstrued state statute. *See Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 500-502 (1941) [hereinafter *Pullman*]. *Pullman's* abstention is avoidable, of course, in only two circumstances. The first, as has been indicated, arises in those cases in which a statute is readily subject to narrowing construction, *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972)—precisely the situation which the Board of Education urges is at issue in this case. Alternatively, abstention may be avoided by establishing that "no alternative to [federal] adjudication is open." *Pullman, supra*, 312 U.S. 496, 498 (1941). A state court alternative is open, however, where state court interpretation of a previously unapplied statute may permit the avoidance of the federal constitutional claim. *See, e.g., Hawaii Housing Authority* v. *Midkiff*, ___ U.S. ___, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186, 194 (1984) [hereinafter *Midkiff*]. In *Midkiff*, Justice O'Connor wrote for a unanimous Court that

> the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is obviously susceptible of a limiting construction." *Zwickler* v. *Koota*, 389 U.S. 241, 251, and n.14 . . . (1967).

104 S.Ct. 2321, 2327, 81 L.Ed.2d 186, 195 (1984). In the instant case, the possibility that the Oklahoma Supreme Court would interpret the statute to require the presence of at least one of the four *nexus* factors which materially affects occupational performance before the statutory pen-

alties may be invoked, can hardly be said to be remote. In fact, caselaw *already* provides that a teacher may be disciplined only when his activities cause a substantial impairment of a teacher's occupational effectiveness. *See* District Court opinion, Jurisdictional Statement, Appendix, 9b.

In sum, the Board of Education respectfully submits that any ambiguity in the challenged statute concerning whether the last four *nexus* requirements described above must be present, in any quantity, before the statute's penalties may be imposed, may be readily resolved by a full, fair, and contextual reading of the statutory language itself. Any ambiguity concerning whether the statute proscribes speech or conduct which does not constitute incitment to imminent lawless action coupled with a clear and present danger of such action is irrelevant, provided that the Board of Education can sustain the application of the balancing test to public school teacher speech, and provided further that it can establish that teacher interests in advocating, encouraging, or promoting criminal homosexual sodomy are outbalanced by legitimate state interests in effective public education. Should this Court conclude that an ambiguity concerning the potency of the *nexus* requirements persists, it should assume that the Oklahoma Supreme Court would resolve it in a constitutional manner when presented with actual facts, *Fox* v. *Washington*, 236 U.S. 273, 277 (1915), abstain and certify the issue to the Oklahoma Supreme Court for resolution, 20 Okla. Stat. 1602, or dismiss.

The proper application of the proper standard of review to the statute, properly construed, may now be more fully addressed.

C. The Tenth Circuit Committed Reversible Error by Engaging in a Mechanistic Application of the Clear and Present Danger Test.

1. The appropriate standard of First Amendment Review, even absent the Governmental Employment Factor, requires an inquiry into the imminence and magnitude of the danger of an utterance, balanced against the need for free and unfettered expression.

In *Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 435 U.S. 829 (1978) [hereinafter *Landmark*], this Court cautioned against mechanistic applications of the "clear and present danger" test as a boilerplate standard of first amendment review, even where *criminal* penalties were imposed on speech. Speaking for the Court, Chief Justice Burger wrote:

> . . . we cannot accept the mechanical application of the [clear and present danger] test which led the [lower] court to its conclusion. Mr. Justice Holmes' test was never intended "to express a technical legal doctrine or to convey a formula for adjudicating cases." *Pennekamp* v. *Florida*, 328 U.S. 331, 353, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946) (Frankfurther, J., concurring). 435 U.S. 829, 841.

Justice Frankfurter embellished his basic first amendment approach, the outlines of which have now been endorsed by this Court, concurring in *Dennis* v. *United States*, 341 U.S. 494, 517 (1951) [hereinafter *Dennis*]:

> The language of the First Amendment is to be read not as barren words . . . but as symbols of historic experience illuminated by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which

> they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining . . . neither impairs its usefulness nor compels its paralysis as a living instrument. *Id.* at 523.

In fact, even the earlier first amendment cases, which purported to apply the "clear and present danger" approach objectively and with certitude, were explicable with equal ease pursuant to a balancing approach. As Justice Frankfurter noted in his *Dennis* concurrance,

> The complex issues presented . . . have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened. The matter has been well summarized by a reflective student of the Court's work. "The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for the speech or political activity; the availability of more moderate controls . . .; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger', or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle." Freund, On Understanding the Supreme Court 27-28. *Id.* at 542, 543.

In short, balancing compels, a judge to take full responsibility for his decisions, and to provide a full, particularized, and rational explanation of their method of arrival — more particularized and rational than the "familiar parade of hallowed abstractions, elastic absolutes, and selective history." Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Calif. L.Rev. 821, 825 (1962). This, too, was noted by Justice Frankfurter in his *Dennis* concurrence, wherein he noted that

> [a]bsolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech . . . are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved. 341 U.S. 494, 524-525 (1951) (Frankfurter, J., concurring).

Thus, in defining the appropriate standard of review in *Landmark*, Chief Justice Burger held that:

> [p]roperly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the states' interests should also be weighed. 435 U.S. 829, 842-843 (1978).

It is assumed that this Court did not intend the *Landmark* balancing formula to be applied in a rigid or mechanistic fashion; thus, the Board of Education respectfully submits that the non-criminal nature of the penalties provided by the Oklahoma Teacher Fitness Statute should also be weighed in the balance. It is further submitted that the

United States Court of Appeals for the Tenth Circuit committed reversible error by failing to correctly apply this standard of review in the instant case.

2. The free speech rights of public employees are not for all purposes congruent with the free speech rights of the citizenry as a whole, and may be outweighed by the interests of the employer in promoting the efficiency of the public services it performs.

This Court has recognized certain rights of the government-employer to control speech and related activities of its employees to a greater degree than that of citizens in general, even when such employee acts occur away from the workplace. For example, in *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 54 (1972), this Court reaffirmed the proscriptions on federal employees' speech after balancing the government's interest in employment efficiency against the interests of the employees in free and unfettered speech. *Id.* at 564. Weighing in favor of the Hatch Act's controls were the governmental interests in the administration of law in accordance with the will of Congress rather than the will of a political party, the interest in avoiding the appearance of impropriety, the interest in avoiding the misuse of the government for purposes of building a powerful political machine, and the interest in merit employment and advancement. These interests, the Court held, permitted governmental regulation of federal employees' speech and speech related activities such as circulating partisan nominating petitions, soliciting votes for political candidates, serving as political convention delegates, actively participating in fund raising for a candidate or party, actively managing the campaign of a partisan candidate, and organizing political clubs or parties. All these activities, of course, enjoy First Amendment protection when performed by members of the citizenry as a whole.

3. The balancing test applies *mutatis mutandis* to public school teachers, whose employment has been recognized as especially sensitive by this Court.

Because of the unique responsibilities which teachers have for helping to develop the impressionable minds and mores of minor children, the speech and conduct of public school teachers has been subject to even closer scrutiny than governmental employees as a whole. For example, in *Kimble* v. *Worth County Board of Education*, 669 S.W.2d 949 (Mo. App. 1984), a Missouri Court of Appeals noted that teachers "occupy positions which bring them in close, daily contact with young persons of an impressionable age." *Id.* at 953. Similarly, in *Faulkner* v. *New Bern-Craven County Board of Education*, 316 S.E.2d 281 (N.C. 1984), the North Carolina Supreme Court stated:

> We do not hesitate to conclude that these men and women are intended by parents, citizenry and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold out teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate. *Id.* at 291.

This Court has also recognized the significance of the governmental interest in providing fit and competent teachers. In *Adler* v. *Board of Education*, 342 U.S. 485 (1952), it held that

> [a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude towards the society in which they live. In this, the state has a vital concern. Id. at 493.

Speaking for this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren described public education as:

> perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. Id. at 493.

More recently, Justice Powell, writing for the majority in *Ambach* v. *Norwick*, 441 U.S. 68 (1979), noted that:

> Within the public school system, teachers play a critical role in developing students' attitudes toward government and understanding of the role of citizens in our society. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is critical to the continued good health of a democracy. *Id.* at 78, 79.

Justice White, in the opinion of this Court in *New York* v. *Ferber*, 458 U.S. 747 (1982), further recognized that, even outside of the public school context, constitutional principles have been applied with special solicitude for the welfare of impressionable minor children:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor is compelling." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince* v. *Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the state's effect on a First Amendment activity. In *Ginsburg* v. *New York*, *supra*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). Id. at 756-757.

Consequently, this Court adopted a balancing test in determining the perimeters of protected speech by public school teachers, both inside and outside the classroom, over ten years prior to its adoption in *Landmark*, *supra*, of a balancing formula for free speech cases generally. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) [hereinafter *Pick-*

ering]. In that case, Justice Marshall, writing for the Court, held that:

> the State has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Id. at 568.

The *Pickering* Court articulated five factors to assist future courts in applying its balancing approach: the need to remove teachers whose speech impedes their occupational effectiveness; the need to maintain employee discipline; the need to preserve harmony among co-workers; the need for personal loyalty and confidence requisite to particularly close employment relationships; and the extent of the public interest in free and unfettered expression of the particular utterance itself. *Pickering, supra,* at 570-574. No suggestion is intended, of course, that this list purports to be exhaustive. Again, however, it must be emphasized that the test articulated in *Pickering* permits the outweighing of public school teacher free speech rights, *even where the speech would be constitutionally protected if uttered by a member of the citizenry as a whole.*

4. Ignoring the balancing test and concomitant guidelines laid down by this Court, the Tenth Circuit erroneously applied a hybrid constitutional standard of review which, as applied by that court, focused almost exclusively on the "clear and present danger" test.

Excluding the "overbreadth" analysis (to be discussed in Propositions II and III *infra*), the reasoning of the Tenth Circuit concerning the standard of review applicable to public school teacher speech is worth reproducing here in full:

> The First Amendment protects "advocacy" even of illegal conduct except when "advocacy" is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time. *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973). . . . We recognize that a state has interests in regulating the speech of its teachers that differ from its interests in regulating the speech of the general citizenry. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. See *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Childers* v. *Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). *National Gay Task Force* v. *Board of Education of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir. 1984) (Jurisdictional Statement, Appendix 6a-7a).

Several threshold obeservations concerning the Tenth Circuit majority's analysis may be advanced at this point.

First, the starting point for that court's analysis was manifestly *Brandenburg*, not *Pickering*. While the Board of Education will maintain that *Brandenburg* is completely inapposite both since that case dealt with a criminal prosecution of an individual who was not a public school teacher (or, for that matter, a governmental employee at all), and since *Brandenburg's* reach has now apparently been limited by *Landmark's* balancing approach, this conclusion is not essential to its argument-in-chief. Since the balancing factors in *Landmark* and *Pickering* did not purport to be exclusive (lest the balancing test, too, fall prey to the danger of mechanistic jurisprudence), it may be conceded, *arguendo*, that, the "clear and present danger" formulation might well be applied as one factor in the balance.

For example, in *Kim* v. *Coppin State College*, 662 F.2d 1055 (4th Cir. 1981), a college professor alleged school retaliation for his participation in a student boycott and picketing. The court, in determining whether his speech was protected, used *Pickering's* balancing test, but included *Brandenburg's* clear and present danger formulation as one factor in the requisite balancing process:

> In applying the *Pickering* analysis to this case, we note at the outset that the activity engaged in by Professors Kim and Bright is within the ambit of the first amendment. Professor Bright spoke to students about their boycott and allegedly offered them counsel. It is nowhere alleged he incited them to boycott or encouraged them to engage in disorderly conduct. Id. at 1065.

After using the "clear and present danger" approach, in part, to determine *whether the speech would have been protected if uttered by a member of the citizenry as a whole*, the Fourth Circuit proceeded to examine the *Pickering* factors to determine *whether the professor's free speech interest was outbalanced by the countervailing governmental interests involved*. 662 F.2d at 1065.

In the instant case, the Board of Education will maintain that, even assuming the cognizability of "clear and present danger" analysis as a legitimate *Pickering* factor, it, too, weighs in favor of sustaining the challenged statute. The classical statement of the formula, adopted by this court in *Dennis* v. *United States*, 341 U.S. 494 (1951), was first articulated by Chief Judge Learned Hand of the Second Circuit Court of Appeals in *United States* v. *Dennis*, 183 F.2d 201 (1950). After noting that this Court, in *American Communications Association, C.I.O.* v. *Douds*, 339 U.S. 382, 394 (1950), cautioned against applying the "clear and present danger" test "as a mechanical test . . . without regard to the context of its application", 183 F.2d at 211, Chief Judge Hand established its content as follows:

> In each case, [the courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. 183 F.2d at 212.

The Board of Education will maintain that the substantive evil which the Oklahoma legislature had a right—and probably a duty— to prevent consists not only in the danger that impressionable school children will imminently commit the crime of homosexual sodomy, but also the dangers that the educational process will be disrupted, that the

students' normal process of social integration may be impaired, and that school children will develop the attitude that law violation in general is socially acceptable conduct.

The Board of Education submits that these evils are so grave that, even assuming their relative improbability based on speech precluded by the Teacher Fitness Statute, a reasonable "clear and present danger" application as one of the factors in the *Pickering* balance would weigh in favor of sustaining it.

The Board of Education does not concede, however, the improbability of reaping the above described evils when the Teacher Fitness Statute is breached. As has been indicated, the statute is narrowly drawn so as to proscribe within its sweep only the advocacy, solicitation, imposition, encouragement, or promotion of criminal homosexual sodomy *"in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."* 70 Okla. Stat. Sec. 6-103.15(A)(2). Moreover, the statute further requires a finding that the teacher has been rendered unfit, by virtue of the proscribed speech or conduct, to hold an instructional position, *id.*, Sec. 6-103.15(B)(2), which determination, in turn, is based on the factors provided in *id.*, Sec. 6-103.15(c):

> The following factors will be considered in making the determination whether the teacher, student teacher, or teachers' aide has been rendered unfit for his position:
>
> 1. The likelihood that the activity or conduct may adversely affect students or school employees;
>
> 2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's, or teachers' aides official duties;

> 3. Any extenuating or aggravating circumstances; and,
>
> 4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

These additional limitations and qualifications on the statute's sweep, which the Board of Education submits relate to legitimate state concerns, will be referred to herein as the statute's *nexus* requirements, as they require a probable causal link between the proscribed activity or conduct and efficient, teacher performance as measured by the broad goals of public education described by this Court in *Adler, Brown, Ambach* and *Pickering*. *Only after their satisfaction may the penalties imposed by the statute be imposed.* The narrow focus of the *nexus* requirements clearly establishes a sufficient likelihood of reaping the substantial evils described above to top any "clear and present danger" componet which this Court may choose to engraft onto the *Pickering* balancing approach in favor of sustaining the challenged statute. At a minimum, given the facial invalidation remedy which the Gay Task Force has elected to pursue, this Court should not conclude the absence of the requisite probability of evil as a matter of law.

In concluding the standard-of-review issue, it may also be observed that the application of a *Tinker* gloss to the *Pickering* balancing formula by the Tenth Circuit majority is inappropriate since that case dealt with student, not teacher, speech.

5. The interests of teachers in advocating, soliciting, imposing, encouraging, or promoting criminal homosexual sodomy in a manner likely to come to the attention of students or co-workers are outweighed by State interests found cognizable by this Court.

As a general matter, this Court has extended a higher level of First Amendment protection to speech concerning broad pubic interests as opposed to speech dealing with matters of more narrow or primarily private concern. *See, e.g., Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942); *Roth* v. *United States*, 354 U.S. 476, 484 (1953); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In *Pickering*, this Court again noted that "free and unhindered debate *on matters of public importance* [constitutes] the core value of the Free Speech Clause of the First Amendment . . ." 391 U.S. 563, 573 (1968). More recently, Justice White, writing for this Court in *Connick* v. *Myers*, 461 U.S. 138 (1983) [hereinafter *Connick*], interpreted the above-described premise as follows:

> *Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, governmental officials should enjoy wide latitude in managing their officers, without instrusive oversight by the judiciary in the name of the First Amendment . . . Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Id.* at 146-148.

Several observations concerning the application of this standard by the Tenth Circuit majority may be made at this point. That court apparently concluded that since, in its interpretation of the statute, teacher testimony before the Oklahoma Legislature concerning the propriety of decriminalizing homosexual sodomy was proscribed by the Teacher Fitness Statute, that statute could conceivably be applied to speech of legitimate public interest and concern. As has been indicated, however, the Oklahoma Supreme Court, in *Gay Activists Alliance* v. *Board of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981), has recognized that peaceable advocacy of the repeal of criminal statutes enjoys protection by the First Amendment. *Id.* at 1122. Moreover, as has been established in Proposition I-A, *supra*, the statute, by its plain meaning, proscribes no more than advocacy, solicitation, imposition, encouragement, or promotion of criminal homosexual sodomy "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees," 70 Okla. Stat. §6-103.15 (A)(2), and based further on consideration of the statute's four nexus requirements described above. The speech proscribed by the statute is very narrow. The Board of Education respectfully submits that advocacy of the commission of criminal homosexual sodomy is not a matter of legitimate public concern, and does not rise to the level of "core political speech" as that phrase has been defined by this Court. As stated by Judge Barrett, dissenting from the Tenth Circuit majority's opinion below, "[p]olitical expression and association is at the very heart of the First Amendment. The advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such." 729 F.2d

1270, 1277 (10th Cir. 1984). (Jurisdictional Statement, Appendix, 11a.) Since such speech furthers no important political or social community interest, it should be afforded little — if any — First Amendment protection, *even if uttered by a member of the citizenry as a whole.*

The statute challenged by the Gay Task Force does not, however, proscribe such speech to members of the citizenry as a whole. Since only teachers come within its ambit, an appropriate First Amendment review must examine the relative weights of the individual and state interests involved. Having established that the social utility of the proscribed utterance is *de minimis* at most, the operation of the balancing test now requires a weighing of the countervailing state interests found cognizable by this Court in *Pickering*. As has been indicated, these factors include the interest in occupational effectiveness, as broadly defined by the purposes of public education; the interest in employee discipline; the interest in co-worker harmony; and the interest in co-worker personal loyalty and confidence.

Teacher advocacy of criminal homosexual sodomy may impair the achievement of these state interests in a number of ways. When it comes to the attention of students, given the significant "role model" function which teachers are called upon to perform, it is likely to engender disrespect for law as an institution, the social responsibilities of citizenship, *and* the political governmental process as a whole. This is true, of course, even if imminent lawless action is not produced. When it comes to the attention of other teachers or co-workers, it is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal

loyalty and confidence requisite to particularly close employee relationships.

In analyzing specific factual situations pursuant to the *Pickering* balancing approach, trial courts have performed detailed analyses as to other factors not *specifically* enumerated in *Pickering's* general guidelines, including

> (1) likelihood of recurrence of the questioned conduct; (2) extenuating or aggravating circumstances; (3) effect of notoriety and publicity; (4) impairment of teacher-student relationships; (5) disruption of the educational process; (6) motive; and (7) proximity or remoteness in time of the conduct. *San Dieguito Union High School District* v. *Commission on Professional Competence*, 185 Cal. Rptr. 203, 205 (1982).

Other cases in which courts have judicially reviewed teacher unfitness determinations are replete with similar factor-analyses. *See, e.g., Morrison* v. *State Board of Education*, 461 P.2d 375, 386 (Cal. 1969); *Coupeville School District No. 204* v. *Vivian*, 677 P.2d 192, 196-197 (Wash. App. 1984). It is interesting to note that, far from sweeping away free speech rights in unnecessarily broad language, the challenged Teacher Fitness Statute, in its nexus requirements set forth above, *tracks, virtually verbatim, the guidelines which have been applied time and time again by trial courts, and approved without deviation on appeal.* It is also interesting to note that Judge Eubanks, in upholding the challenged statute at the District Court level, noted this fact, and considered (insofar as is possible when a statute is facially challenged) whether the conduct proscribed by that statute was likely to lead to disruption of the educational process. Jurisdictional Statement Appendix, at 6b-7b. Finally, it is interesting to note that no such analysis

may be found in the opinion of the Tenth Circuit majority, which asserted, ignoring both Judge Eubanks' opinion and the facial nature of the challenge, that the Board of Education "has made no such showing [of disruption of official functions or impairment of teacher performance]." 729 F.2d 1270, 1274 (10th Cir. 1984); Jurisdictional Statement, Appendix, at 7a.

II. THE TENTH CIRCUIT COMMITTED REVERSIBLE ERROR BY APPLYING THE REMEDY OF FACIAL INVALIDATION TO THE CHALLENGED TEACHER FITNESS STATUTE.

A. Since the Statute Proscribes no Speech Which Is Constitutionally Protected to Public School Teachers, There Is no Overbreadth Whatsoever Present in Its Sweep.

The challenged statute was carefully drafted and is narrowly drawn. As has been maintained in Proposition I-A *supra*, its plain meaning, when the *nexus* requirements are properly considered, indicates that it sweeps no more broadly than is necessary to insure that the broad purposes of public education, including not only learning, but also student respect for law and public morality, and student social development, are protected. These public goals have long been endorsed by this Court.

Given the necessarily broad guidelines established for public school teacher speech by this Court in *Pickering*, *supra*, 391 U.S. 563, 569-573 (1968), it is difficult to imagine how *nexus* requirements might be drafted more narrowly while still ensuring the interests which the state has a right — if not a duty — to promote. The Board of Education therefore respectfully submits that, given future reasonable applications of the challenged statute when courts and hearing officers are presented with actual facts — an assumption there is no reason to doubt — the statute is not overbroad at all, and should be facially sustained, on the merits, by this Court.

B. Alternatively, If Any Overbreadth Is Present in the Statute, It Is Not "Substantial" as That Term Has Been Defined by this Court.

Since the remedy of facial invalidation constitutes an exception to "two cardinal principles of our constitutional order — the personal nature of constitutional rights . . . and prudential limits on constitutional adjudication", *New York v. Ferber*, 458 U.S. 747, 767 (1982) [hereinafter *Ferber*], this Court has directed that it be employed "sparingly and only as a last resort", *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) [hereinafter *Broadrick*], and only in those situations in which no limiting construction of the challenged statute is available. *Id.* The Board of Education strongly urges, of course, that such a limiting construction — if necessary — is readily available. *See* Proposition I-A *supra*.

While this Court has required the lower courts, in cases where facial invalidation is sought, to proceed with "caution and restrain, as invalidation may result in unnecessary interference with a state regulatory program," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1974), the Tenth Circuit majority did not so proceed. While noting the existence of the statute's *nexus* requirements, it dismissed them with the observations that they did not satisfy the *Brandenburg* test, that "many adverse effects are not ma-

terial and substantial disruptions" (referring to the inapposite *Tinker* test), that the *nexus* requirements were not weighted by the statute, and that "[a]n adverse effect is apparently not even a prerequisite to a finding of unfitness." 729 F.2d 1270, 1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 7a-8a. Since the inadequacy of this analysis pursuant to the approach established by *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and other cases has been dealt with extensively *supra*, it need only be noted here that this analysis does not evidence the requisite "caution and restraint" by the Tenth Circuit majority in facially invalidating the challenged statute.

Nor did the Tenth Circuit majority explore the availability of any "limiting construction", which it was required to do pursuant to the overbreadth approach established by this Court in *Broadrick*, *supra*, 413 U.S. 601, 613 (1973), holding instead that "[i]t is not within this Court's power to construe and narrow state statutes." 729 F.2d 1270, 1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 8a.

Concomitant to the overbreadth policies and principles described above, this Court went on to hold in *Broadrick*, *supra*, that

> particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

413 U.S. 601, 615 (1973).

As this Court observed in *Ferber*, *supra*, "the [*Broadrick*] requirement of substantial overbreadth extended 'at the very least' to cases involving conduct plus speech".

458 U.S. 747, 771 (1982), noting further that, "*on most occasions* involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression". *Id.* (emphasis added). The "conduct plus speech" limitation on the substantial overbreadth doctrine — if, in fact, it was ever intended to be a limitation at all — was removed by this Court's observation in *Ferber* that

> [t]he requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech.

Id., 772 (Citation omitted). This Court also cited with approval therein a foundational justification for applying a "substantial overbreadth" limitation in *all* First Amendment cases:

> "A substantial overbreadth rule is implicit in the chilling effect rationale. . . . [T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "[w]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Note, 83 Harv. L. Rev., *supra* n. 25, at 859, and n. 61.

Ferber, supra, 458 U.S. 747, 772 n. 27 (1984); *see generally* M. NIMMER, *Nimmer On Freedom of Speech* 4-153, 4-154 (1984). Even assuming *arguendo* any continued viability of the "speech plus conduct" approach, "soliciting" or "imposing" criminal homosexual sodomy, proscribed by the challenged statute, 70 Okla. Stat. Sec. 6-103.15(A)(2), and also held facially unconstitutional by the Tenth Circuit majority, should satisfy any such requirement.

Case-by-case analysis, of course, better serves the interests of justice than facial overbreadth invalidation where only insubstantial hypothetical overbreadth exists. *See Broadrick, supra,* 413 U.S. 601, 615-616 (1973); *Ferber, supra,* 458 U.S. 747, 774 (1982). As expressed by Justice Stevens, concurring in the judgment in *Ferber,*

> [w]hen we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

Ferber, supra, 458 U.S. 747, 780-781 (1982) (Stevens, J., concurring in the judgment).

This observation, true generally, is especially apposite in the governmental employment context, where no criminal penalties may be imposed. As Judge Leventhal observed in *Waters* v. *Peterson,* 495 F.2d 91 (D.C. Cir. 1973),

> [w]hile the problem of overbreadth in the public employment sphere can raise First Amendment questions, . . . it does not necessarily require the same remedy as overbreadth in the criminal statutes; specifically, it does

> not require either a prohibition of any and all penalties, or striking down the regulation, since in matters pertaining to "efficiency of the service" it may be impossible to avoid a broadly-worded regulation. Deterrance of legitimate speech must be minimized by proper *application* of the prohibition to activity not protected by the First Amendment.

Id., 99. (Emphasis added). In *Ferber, supra,* this Court also recognized that the penalty to be imposed is relevant in determining whether even demonstrable overbreadth is substantial. 458 US.. 747, 773 (1982). The Board of Education respectfully submits that the *nexus* requirements contained in the challenged statute approach their subject with as great a specificity as can reasonably be required, and that the non-criminal nature of the statutory penalties be considered when determining the rigor with which the strong medicine of facial overbreadth should be applied.

In sum, the statutory proscriptions against the indiscreet solicitation or imposition of criminal homosexual sodomy by public school teachers were stricken by the Tenth Circuit majority along with the rest, and the rest should be controlled by *Pickering,* not *Brandenburg.* Clearly, the challenged Teacher Fitness Statute is one which, if overbroad at all, has a legitimate reach which "dwarfs its arguable impermissible applications". *Ferber, supra,* 458 U.S. 747, 773 (1982). It should not be facially invalidated based on marginal, hypothetical applications of the law.

CONCLUSION

The Tenth Circuit majority below, having interpreted the challenged statute in a manner inconsistent with its plain meaning and virtually inescapable implications, then proceeded to test it by an incorrect standard of First Amendment review. Having committed these two fundamental errors, the commission of its third error was inevitable: it voided the statute as facially overbroad. The Board of Education respectfully submits that the interests of justice and judicial economy are best served by reversal of the Circuit opinion below.

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